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Teoh Cy Kuan (L) v Lee Lai San (P)

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HIGH COURT (SHAH ALAM) — DIVORCE PETITION NO 33–483–08 OF 2019
HAYATUL AKMAL J
13 JANUARY 2020

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Family Law — Divorce — Petition — Petitioner husband filed divorce petition — Respondent wife filed application to add co-respondent alleged to be in adulterous relationship with petitioner husband — Whether foundation for application was provided — Whether respondent wife failed to comply with Divorce and Matrimonial Proceedings Rules 1980 and Rules of Court 2012 — Whether action taken by respondent wife contrary to normal, established and regulated practise in matrimonial proceedings

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This was an application filed by the respondent wife ('RW') against the petitioner husband ('PH') to add a person as a co-respondent in this divorce petition filed by the PH under s 53 of the Law Reform (Marriage and Divorce Act) 1976 ('the LRA'), seeking for the dissolution of his marriage to the RW and other prayers. Instead of filling her answer to the petition as mandated by r 16(1) of the Divorce and Matrimonial Proceedings Rules 1980 ('the DMPR 1980'), RW had chosen to file this application to add the co-respondent which she alleged was in an adulterous relationship with her husband and she intended to claim damages from her. This application was challenged by PH who in his affidavit in reply, argued that the said application was wrong in law and untenable, since RW had yet to reply to the petition and had failed to comply with the provision under the DMPR 1980 and Rules of Court 2012.

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Held, dismissing RW's application with costs of RM1,000:

(1) RW's affidavit in support did not particularise the alleged adulterous relationship, did not provide any cogent materials of evidence in which to anchor the said allegation and provided the foundation for the allegation in order to support the said application. RW had failed to file any reply to the said petition as required by the LRA and the DMPR 1980, but erroneously, proceeded to file an application to add a co-respondent and therefore failing to provide the foundation for the present application (see para 13).

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(2) In RW's application and affidavit in support, there was absolutely nothing in terms of facts or corroboration to even satisfy a reasonable and preliminary threshold of evidence to invite the court to inquire into the matter in order to allow the proposed joinder with the inclusion of the

named party as a co-respondent. There was simply no existence of any degree of plausible evidence adduced. There was a complete failure on the part of RW to comply with the instructions by the learned senior assistant registrar during several of the case management sessions and RW had failed to file any pleading (reply to the petition) in response to the said single petition for divorce filed by PH (see para 14).

(3) The action taken by RW to be contrary to the normal, established and regulated practise in matrimonial proceedings. By RW failing to answer (a principal obligation) the said petition for divorce, with no lawful excuse, she could not simply proceed on an application on alleged adultery by PH when the rules and the law required it to be stated in the said petition or answered to the said petition and only then an application for leave to add a co-respondent arose (see para 16).

[Bahasa Malaysia summary

Ini adalah permohonan yang difailkan oleh responden isteri ('RW') terhadap pemohon suami ('PH') untuk menambahkan seseorang sebagai responden bersama dalam petisyen perceraian ini yang difailkan oleh PH di bawah s 53 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta'), memohon pembubaran perkahwinannya dengan RW dan permohonan lain. Daripada memfailkan jawapannya atas petisyen yang dimandatkan oleh k 16(1) Peraturan Prosiding Perceraian dan Perkahwinan 1980 ('Peraturan'), RW memilih untuk memfailkan permohonan ini untuk menambahkan responden bersama yang didakwa mempunyai hubungan perzinaan dengan suaminya dan dia berniat untuk menuntut ganti rugi darinya. Permohonan ini ditentang oleh PH yang dalam afidavit jawapannya, berpendapat bahawa permohonan tersebut salah di sisi undang-undang dan tidak dapat dipertahankan, kerana RW belum dapat menjawab petisyen tersebut dan telah gagal mematuhi peruntukan di bawah Peraturan dan Kaedah-Kaedah Mahkamah 2012.

Diputuskan, menolak permohonan RW dengan kos RM1,000:

(1) Afidavit sokongan RW tidak menjelaskan hubungan perzinaan yang didakwa, tidak memberikan bahan bukti yang tepat untuk menyokong dakwaan tersebut dan memberikan asas untuk tuduhan tersebut untuk menyokong permohonan tersebut. RW gagal memfailkan jawapan atas petisyen tersebut sebagaimana yang diperlukan oleh Akta dan Peraturan, tetapi secara salah, memfailkan permohonan untuk menambahkan responden bersama dan oleh itu gagal memberikan asas untuk permohonan ini (lihat perenggan 13).

(2) Dalam permohonan dan afidavit sokongan RW, sama sekali tiada dari segi fakta atau sokongan untuk memenuhi ambang bukti yang munasabah dan awal untuk mengundang mahkamah untuk menyoal

perkara tersebut untuk membenarkan penggabungan yang dicadangkan dengan memasukkan nama pihak yang disebutkan sebagai responden bersama. Tiada keterangan dikemukakan. Terdapat kegagalan sepenuhnya dari pihak RW untuk mematuhi arahan oleh penolong pendaftar kanan yang bijaksana ketika beberapa sesi pengurusan kes dan RW telah gagal mengemukakan sebarang permohonan (jawapan kepada petisyen) sebagai jawapan kepada petisyen perceraian tersebut yang difailkan oleh PH (lihat perenggan 14).

(3) Tindakan yang diambil oleh RW bertentangan dengan amalan biasa, yang telah ditetapkan dan diatur dalam prosiding perkahwinan. Dengan RW yang gagal menjawab (kewajipan utama) petisyen perceraian tersebut, tanpa alasan yang sah, dia tidak dapat dengan mudah meneruskan permohonan dakwaan perzinaan oleh PH ketika peraturan dan undang-undang mengharuskannya dinyatakan dalam petisyen tersebut atau dijawab kepada petisyen tersebut dan barulah permohonan kebenaran untuk menambah responden bersama muncul (lihat perenggan 16).]

Cases referred to

Avtar Singh a/l Sukhdev Singh v Anita Rani a/p Harjit Singh [2012] MLJU 352, HC (refd)
Bastable v Bastable [1968] 1 WLR 1684, CA (refd)
GGC v CCC & Anor [2016] MLJU 377; [2016] 1 LNS 885, HC (refd)
Cropper v Smith (1884) 26 Ch D 700, CA (refd)
Dr Gurmail Kaur a/p Sadhu Singh v Dr Teh Seong Peng & Anor [2014] 11 MLJ 843; [2015] 2 CLJ 42, HC (refd)
Geeta Bai v Fattu AIR 1966 MP 133 (refd)
Hee Awa & Ors v Syed Muhammad Sazalay & Anor [1988] 1 MLJ 300, SC (refd)
Ho Ching Choo lwn Ng Kian Beng [2011] MLJU 584; [2011] 6 MLRH 344, HC (refd)
Jagdis Singh a/l Banta Singh v Outlet Rank (M) Sdn Bhd [2013] 4 MLJ 213; [2013] 3 CLJ 47, CA (refd)
Joseph Jeganathan v Rosaline Joseph [1989] 3 MLJ 106, HC (refd)
Karen Cheong Yuen Yee v Phua Cheng Chuen [2004] MLJU 291, HC (refd)
Mark Lester Jackson lwn Maryanne a/p Alexander V Charles dan satu lagi [2016] 10 MLJ 673; [2016] MRHU 1510, HC (refd)
Ng Hee Thong & Anor v Public Bank Bhd [2000] 2 MLJ 29, CA (refd)
PP v Lee Fook [2011] 7 MLJ 671, HC (refd)
SS v HJK [1991] MLJU 18; [1991] 1 LNS 99; [1992] AMR 145, HC (refd)
Sanmaru Overseas Marketing Sdn Bhd & Anor v PT Indofood Interna Corp & Ors [2009] 2 MLJ 765; [2009] 3 CLJ 10, CA (refd)
Shireen a/p Chelliah Thiruchelvam v Kanagasingam a/l Kandiah (Sureshan Marcandan, party cited) [2012] 7 MLJ 315, HC (refd)

A *Shudesh Kumar a/l Moti Ram v Kamlesh a/p Mangal Sain Kapoor* [2005] 5 MLJ 82, HC (refd)
Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1; [2015] 7 CLJ 548, FC (refd)
Sykt Telekom Malaysia Bhd v Business Chinese Directory Sdn Bhd [1994] 2 MLJ
B 420, SC (refd)
Tajjul Ariffin bin Mustafa v Heng Cheng Hong [1993] 2 MLJ 143, SC (refd)
Wee Hock Guan v Chia Chit Neo & Anor [1964] 1 MLJ 217 (refd)
Yew Yin Lai v Teo Meng Hai & Anor [2013] 8 MLJ 787, HC (refd)

C **Legislation referred to**

Rules of Court 2012 O 1A, O 2 r 1, O 15 rr 4(1)(a), (1)(b), 6, 6(1), (2)(b)(i), (2)(b)(ii)
Divorce and Matrimonial Proceedings Rules 1980 rr 11, 15(3), 16(1), (2),
D 17(3), 102
Law Reform (Marriage and Divorce Act) 1976 ss 53, 54(1)(a), 58, 58(1), (3)(b)

N Ravi Rajan (Ravi Rajan & Assoc) for the petitioner husband.
CY Kuan (Arden Kuan & Co) for the respondent wife.

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Hayatul Akmal J:

INTRODUCTION

F **[1]** This is an application (encl 11) filed by respondent wife ('RW') against the petitioner husband ('PH') to add a person by the name of Cheong Wei Ling as a co-respondent in this divorce petition (encl 1) filed by the petitioner husband ('PH') under s 53 of the Law Reform (Marriage and Divorce Act) 1976 ('the LRA'), seeking for the dissolution of his marriage to the respondent
G wife ('RW') and other prayers.

[2] For ease of reference I reproduce (briefly) the claim by RW against PH as follows:

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1. Nama Cheong Wei Ling (No. K/P: 780522-02-5492) ditambah sebagai seorang co-responden Ke-2 dalam Petisyen Perceraian bertarikh 16.08.2019.

2. Kos untuk permohonan ini dijadikan kos dalam kausa; dan

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3. Apa-apa relief yang Mahkamah yang Mulia anggap adil dan munasabah.

In her affidavit in support (encl 12), RW alleged that the named co-respondent is in an adulterous relationship with PH and she intend to claim damages from the said Cheong Wei Ling.

[3] This application is challenged by PH who in his affidavit in reply (encl 13), argued that the said application is wrong in law and untenable, since RW has yet to reply to the petition and has failed to comply with the provision under the Divorce and Matrimonial Proceedings Rules 1980 ('the DMPR 1980') and Rules of Court 2012 ('RC 2012').

[4] The relevant cause papers are as follows:

(a) encl 1: divorce petition filed on 16 August 2019;

(b) encl 2: PH's affidavit in support affirmed by Teoh CY Kuan;

(c) encl 3: notice of appointment of solicitors;

(d) encl 4: statement as to arrangement for children;

(e) encl 5: statement as to properties;

(f) encl 7: affidavit of service affirmed by Migan Raaj a/l Muniandy;

(g) encl 8: notice of proceedings;

(h) encl 10: acknowledgment of service;

(i) encl 11: RW's application to add co-respondent;

(j) encl 12: RW's affidavit in support affirmed by Lee Lai San; and

(k) encl 13: PH's affidavit in reply affirmed by Teoh CY Kuan.

Submissions/submissions in reply by PH and RW.

On 13 January 2020, after perusing the cause papers filed and the respective written submissions of the parties, I dismissed RW's application with cost of RM1,000 awarded to PH. Dissatisfied, RW had filed this appeal and my reasons are as follows:

BRIEF FACTS

[5] The brief facts disclosed from the cause papers which are relevant to the present application are as follows:

(a) on 16 August 2019, PH filed a single divorce petition under s 53 of the LRA seeking for a dissolution of his marriage to RW, transfer of property and other prayers;

(b) on 23 September 2019:

  (i) the divorce petition dated 29 July 2019; and

  (ii) PH's affidavit in support affirmed by Teoh CY Kuan; and

  (iii) notice of appointment of solicitors; and

(iv) statement as to arrangement for children; and

(v) statement as to properties.

Were duly served on the solicitor for RW with an acknowledgment receipt ((exh MR1) — (encl 7));

(c) on 29 October 2019 the learned counsel for PH filed notice of proceedings and on the same day, the learned counsel for RW filed an acknowledgment of service;

(d) however, instead of filling her answer to the petition as mandated by r 16(1) of the DMPR 1980, RW had chosen to file an application to add a co-respondent which she alleged is in an adulterous relationship with her husband and is presently living with him at the matrimonial home;

(e) PH in his affidavit in reply averred that the said sealed application (encl 11) was not even served on his solicitor until the day he affirmed his affidavit in reply (encl 13) and further averred that the divorce petition is dated 29 July 2019 not 16 August 2019 as claimed by RW in her affidavit in support (encl 12). PH further averred that what was done by RW is wrong in law as she has failed to comply with the DMPR 1980 and RC 2012 and is not tenable;

(f) PH denies RW's averment (para 6 of her affidavit in support) on this alleged adultery. PH averred that:

(i) RW had left the matrimonial home sometime around April 2017 and in August 2017, had removed all her personal belongings from the said home;

(ii) on 10 April 2018, RW's solicitors stated that RW had agreed to proceed with a joint divorce petition;

(iii) on 23 April 2018, PH through his solicitor had replied to the said letter and had forwarded a few terms for the said joint petition where the solicitor for RW then through his letter dated 23 April 2018 suggested that PH reconsider the terms;

(iv) on 16 May 2018, PH through his solicitor issued a letter on the 'counter proposal' from RW and her solicitor's letter dated 14 August 2018, confirmed her stand to proceed with a joint divorce petition;

(v) on 27 May 2019, PH reiterated his terms as contained in his earlier letter dated 23 April 2018. Since RW failed to reply to this letter, he instructed his solicitor to proceed with the single divorce petition (encl 1) under s 53 of the LRA and simultaneously informed the solicitor for RW;

(vi) on 23 September 2019 all the relevant documents were served on the solicitor for RW;

(vii) the first case management ('CM') date was fixed on 27 September 2019 where the solicitor for RW failed to attend but asked the solicitor for PH to mention on behalf and parties were duly informed of the second CM dated fixed on 23 October 2019;

(viii) on 23 October 2019 CM, the solicitor for RW again failed to be present and again had asked the solicitor for PH to mention on behalf and the third CM dated was fixed on 30 October 2019;

(ix) on 29 October 2019, RW has yet to file her reply to the said divorce petition and she had instead proceeded in filling the present application (encl 11) to add the named co-respondent;

(x) PH claimed RW's action was intended to tarnish his reputation and designed to prejudice his application for the divorce; and

(xi) she had failed to comply with established rules and practise on divorce proceedings and the instructions as directed by the learned senior assistant registrar ('SAR') during the CM.

SUBMISSION FOR THE RESPONDENT WIFE ('RW')

[6] RW argued that the present application was filed under s 58 of the LRA and r 15(3) of the DMPR 1980 and submitted that parties had been married for 16 years with no children. She alleged that, PH is in an adulterous relationship with the named co-respondent and this why she is now applying for the named co-respondent to be added as a party in this divorce petition.

[7] For this purpose, I was alluded to:

(a) *Ho Ching Choo lwn Ng Kian Beng* [2011] MLJU 584; [2011] 6 MLRH 344, where the court had allowed the application to add the adulterer as a co-respondent; and

(b) *Mark Lester Jackson lwn Maryanne a/p Alexander V Charles dan satu lagi* [2016] 10 MLJ 673; [2016] MRHU 1510, where the court decided that parties can apply to add the co-respondent before serving the divorce petition to the adulterer.

RW argued that since the co-respondent was not named in this divorce petition and since RW has the intention to claim damages from the co-respondent, the co-respondent must therefore be added to the present divorce petition.

SUBMISSION BY THE PETITIONER HUSBAND ('PH')

[8] PH submitted that the application (encl 11) ought to be dismissed based of the following reasons:

(a) this is a delay tactic by RW;

(b) she had failed to serve PH the sealed copy of this application;

(c) she had failed to follow the provisions of the law;

(d) she had failed to particularise the allegation of adultery;

(e) she had failed to file any pleadings in response to the said petition for divorce; and

(f) RW had failed to prove that this application had been served on the alleged co-respondent.

RW had failed to comply with DMPR 1980 and RC 2012. It is well settled that any application to add a person as a party to any proceeding must comply with O 15 r 6 of the RC 2012. I was alluded to:

(i) *Hee Awa & Ors v Syed Muhammad Sazalay & Anor* [1988] 1 MLJ 300 where Mohamed Azmi SCJ said:

> The respondents' application to add the motorcyclist as co-defendant falls squarely within the terms of O 15 r 6(2)(b) of the Rules of the High Court 1980. Under the provision of O 15 r 6(2)(b) Rule of High Court 1980, it is clear that the court has a discretion to grant or refuse the order of making any person as a party with the exception that such order cannot be made to add a person as a plaintiff without his consent. The order can be granted either on the court's own motion or on the application of any person who is already a party, or of an intervener who wishes to be added as a party. The person to be added as a party must be a person who ought to have been joined as a party or whose presence in court is necessary to ensure that all matters in dispute may be effectually and completely determined and adjudicated upon ...';

(ii) *Tajjul Ariffin bin Mustafa v Heng Cheng Hong* [1993] 2 MLJ 143 where it was held:

> ... the power of the court to add a defendant on the application of the defendant, against the wishes of the plaintiff is entirely discretionary and the only fetter which O 15 r 6(2)(b)(i) of the RHC places upon the exercise of the discretion is that it should be exercised where there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the court, it would be just and convenient to determine as between the person sought to be joined and that party as well as between the parties to the cause or matter.

[9] PH submitted that by referring to r 11 of the DMPR 1980, before any

application to add a co-respondent, the respondent must first reply to the petition and named the co-respondent in her reply and if there is an allegation of adultery, the provision of r 11 of the DPMR 1980 must be adhered to. I was also alluded to the case of *Dr Gurmail Kaur a/p Sadhu Singh v Dr Teh Seong Peng & Anor* [2014] 11 MLJ 843; [2015] 2 CLJ 42, where Yaacob Md Sam J (as His Lordship then was) held as follows:

> It is trite law that in relation to an allegation of adultery, the standard of proof for adultery is beyond reasonable doubt and the adultery had caused the breakdown of the marriage as enunciated in the following cases:
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> (a) *Wee Hock Guan v Chia Chit Neo & Anor* [1964] 1 MLJ 217, CJ Singapore, Winslow J said:
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> It is well established that an allegation of this nature must be proved to the satisfaction of the court beyond reasonable doubt and that the onus of so satisfying the court in this case rests upon the petitioner. The evidence must go beyond establishing suspicion and opportunity to commit adultery and must be such as to satisfy the Court that from the nature of things adultery must have been committed; where the evidence is entirely circumstantial the Court will not draw the inference of guilt unless the facts relied on are not reasonably capable of any other explanation. The inference of adultery arises when there is proof of the disposition of parties to commit adultery, together with the opportunity to commit it;
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> (b) *Choong Yee Fong v Ooi Seng Keat & Anor* [2006] 1 MLJ 791; Faiza Tamby Chik J said:
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> The petitioner must prove to the satisfaction of the court beyond reasonable doubt that the respondent had committed adultery and it is due to the alleged adulterous relationship which led to the breakdown of the marriage.

[10] The learned counsel submitted that RW had failed to provide for her allegation of adultery with believable evidence. Her bare averment that the co-respondent is in an adulterous relationship with PH is insufficient in her application to add the co-respondent.

THE LAW

[11] The Law Reform (Marriage and Divorce) Act 1976 (Act 164) ('the Act') on adultery provides as follows:

(a) s 54(1)(a):

> In an inquiry into the facts and circumstances alleged as causing or leading to the breakdown of the marriage, the court shall have regard to one or more of the following facts, that is to say:
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> ... That the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent ...

Adultery is an action by the alleged adulterer or adulteress in consensual sexual intercourse between a married person and a person of an opposite sex, who is not the other's spouse during the subsistence of the marriage. It is presently not a criminal offence under the Penal Code (see *Geeta Bai v Fattu* AIR 1966 MP 133; *Public Prosecutor v Lee Fook* [2011] 7 MLJ 671; *Bastable v Bastable* [1968] 1 WLR 1684, Wilmer LJ: True it is not a criminal offence; it is a matrimonial offence ... a high standard of proof is required in order to satisfy the court that the offence has been committed'. It is to be noted that:

(i) adultery have no relevance in determining division of matrimonial assets (see *SS v HJK* [1991] MLJU 18; [1991] 1 LNS 99; [1992] AMR 145);

(ii) the power of the court to award damages in adultery cases against the co-respondent under s 58 of the LRA shall not include any exemplary or punitive element;

(iii) the mere fact of the existence of adultery is not enough to satisfy the breakdown of marriage, it must be intolerable for the petitioner to continuing living with the wrong doer (s 54(1)(a) of the LRA). KC Vohrah J in *Joseph Jeganathan v Rosaline Joseph* [1989] 3 MLJ 106, said that the proper test to be adopted is whether a right thinking man in all the circumstances would conclude that the respondent had behaved in such a way that the petitioning spouse could not reasonably be expected to live with the respondent. It is trite presently, that the allegation of adultery must be proved to the satisfaction of the court beyond reasonable doubt by oral testimony and to be tested by cross-examination and re-examination at trial. For it to be established, the evidence that is required should be beyond establishing suspicion and opportunity to commit adultery (see *Dr Gurmail Kaur a/p Sadhu Singh v Dr Teh Seong Peng & Anor*; *Karen Cheong Yuen Yee v Phua Cheng Chuen* [2004] MLJU 291). However, in *GGC v CCC & Anor* [2016] MLJU 377; [2016] 1 LNS 885, it was postulated by the learned judge in that case that, burden of proof on adultery in divorce matters which amounts to fraud on a spouse in civil proceedings should be scaled on a balance of probabilities in consonance with the Federal Court decision in *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] 7 CLJ 548, that had ruled for fraud in civil case should be proved on balance of probabilities;

(iv) the court will not draw an inference of guilt unless the facts relied on are not reasonably capable of any other explanation (see *Wee Hock Guan v Chia Chit Neo & Anor* [1964] 1 MLJ 217). It is generally proved by:

(1) circumstantial evidence;

(2) evidence of non-access and birth of children (in allegations of adultery against women);

(3) contracting venereal diseases from external sources; and

(4) admissions and confessions by the parties themselves.

(See *Shireen a/p Chelliah Thiruchelvam v Kanagasingam a/l Kandiah (Sureshan Marcandan, party cited)* [2012] 7 MLJ 315; *Yew Yin Lai v Teo Meng Hai & Anor* [2013] 8 MLJ 787). In *Shudesh Kumar a/l Moti Ram v Kamlesh a/p Mangal Sain Kapoor* [2005] 5 MLJ 82, it was found that the alleged adulteress was not made a party to the proceedings and no allegation of the wife not being in a situation where it was intolerable to live with the petitioner as a consequence of the alleged adultery had been pleaded as required under s 54(1)(a) of the LRA, and this amounted to the wife shutting herself out from seeking relief under sub-s (1)(a). She had fallen short of the requirement of the law in her pleadings.

(b) s 58 of the LRA:

> 58 Damages for adultery may be claimed against co-respondent.
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> (1) On a petition for divorce in which adultery is alleged, or in the answer of a party to the marriage, praying for divorce and alleging adultery, the party shall make the alleged adulterer or adulteress a co-respondent, unless excused by the court on special grounds from doing so.
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> (2) A petition under subsection (1) may include a prayer that the co-respondent be condemned in damages in respect of the alleged adultery.
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> (3) Where damages have been claimed against a co-respondent:
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> (a) if, after the close of the evidence for the petitioner, the court is of the opinion that there is not sufficient evidence against the co-respondent to justify requiring him or her to reply, the co-respondent shall be discharged from the proceedings; or
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> (b) if at the conclusion of the hearing, the court is satisfied that adultery between the respondent and co-respondent has been proved, the court may award the petitioner such damages as it think fit, but so that the award shall not include any exemplary or punitive element.

(c) a party to a divorce alleging adultery is therefore required to:

(i) make the alleged adulterer or adulteress (as the case may be) a co-respondent in the divorce proceeding (see *Avtar Singh a/l Sukhdev Singh v Anita Rani a/p Harjit Singh* [2012] MLJU 352);

(ii) the defendant has to file a petition for divorce and cite the alleged adulterer as a co-respondent or if the wife filed for divorce, then the defendant has to cite the adulterer in his answer to the divorce petition as required by ss 54(1)(a) and 58(1) of the LRA (see *Shireen a/p Chelliah Thiruchelvam v Kanagasingam a/l Kandiah (Sureshan Marcandan, party cited)*);

(iii) by failing to plead properly, the defaulting party had in fact shut itself

A out from seeking relief under ss 54(1)(a) and 58(1) of the LRA (see *Shudesh Kumar a/l Moti Ram v Kamlesh a/p Mangal Sain Kapoor*);

(iv) Divorce and Matrimonial Proceedings Rule 1980 which regulate the flow and procedure of the divorce proceeding filed under the LRA is also read together with the RC 2012. It is intended to provide clarity and uniformity in divorce proceedings which necessitate conformity with its requirement. Non-compliance with these rules shall not render any proceedings void unless the court shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the court shall think fit in the circumstances of the case (r 102). The conformity to these rules is fundamental in the course of litigation between the parties herein. Though the court is aware that too rigid an adherence to the rules could in certain circumstances, inappropriately deprived the litigants of their rights but such incompliance ought not to be blatant, intentional, or disrespectful with no corrective measures (mitigative) taken to correct the error though knowledge of such error is apparent (see *Jagdis Singh a/l Banta Singh v Outlet Rank (M) Sdn Bhd* [2013] 4 MLJ 213; [2013] 3 CLJ 47 (CA)). Lord Bowen in *Cropper v Smith* (1884) 26 Ch D 700, said:

> ... the object of the courts is to decide the rights of the parties, not to punish them for the mistake they make in the conduct of their cases by deciding otherwise than in accordance with their rights ... I know of no kind of error or mistake which, if not fraudulent or intend to overreach, the court ought not to correct, if it can be done without injustice to the other party.

(v) r 11 of the DPMR 1980: clearly regulate that where a petition (s 58(1) of the LRA) includes answer to the said petition, alleges adultery, the person with whom the adultery is alleged to have been committed shall be made a co-respondent in the cause unless that person is not named in the petition, and the petition contains a statement that his or her identity is not known to the petitioner; or the court otherwise directs. In the present case, r 16(1) DPMR 1980 applies to direct that RW is to file an answer to the said petition by PH within 21 days after the time limited for giving notice of the intention to defend to dispute the petition and to cite the alleged adultery and the adulteress in her answer which she had blatantly failed to do so with no lawful excuse (and has not taken any step in the proceedings with knowledge of the irregularity to remedy it) though r 16(2) of the DPMR 1980 affords some latitude in the matter. Rule 102 of the DPMR 1980 stipulate that non-compliance with these rules or any rule in practise in force shall not render the proceedings void unless the court shall so order;

(vi) cognisance can be taken that O 1A of the RC 2012, had prescribed that the court (in administering the Rules) shall always have regard to the

overriding interest of justice and not only to the technical compliance which is further solidified with O 2 r 1 of the RC 2012, which makes non-compliance an irregularity where the court is to have the overriding objective of treating cases justly at the forefront of its consideration.

[12] Order 15 r 6(1) of the RC 2012 makes it clear that a cause or matter will not be defeated by reason of the misjoinder or non-joinder thereof. The court can still proceed to determine issues in dispute between the parties (see *Sanmaru Overseas Marketing Sdn Bhd & Anor v PT Indofood Interna Corp & Ors* [2009] 2 MLJ 765; [2009] 3 CLJ 10 (CA)). When an application is made to add a party to the proceeding:

(a) O 15 r 4(1)(a) and (b) of the RC 2012, must be satisfied in that there is a common question of law or fact involving all these parties (including the new party); and the relief sought arises from the same transaction involving all these parties; and

(b) satisfaction of O 15 r 6(2)(b)(i) or (ii) of the RC 2012, that the court is convinced by adding the new party would effectually and completely determine the issues before the court (O 15 r 6(2)(b)(i)), or would be just and convenient to determine the matter by including the new party (O 15 r 6(2)(b)(ii)).

FINDINGS OF THIS COURT

[13] RW's notice of application (encl 11) to add a co-respondent in this single divorce petition (encl 1) filed by PH, is supported by her three page affidavit (encl 12) in which there are only three paragraphs (5, 6 and 7) seeking to add the named person as a co-respondent:

(a) para 5 (three lines) asked for the joinder of the named person as a party;

(b) para 6 (three lines) merely makes a bare allegation of the alleged adulterous relationship between the named party and PH; and

(c) para 7 (three lines) asked for the joinder of the name party as a co-respondent.

The said affidavit in support do not particularise the alleged adulterous relationship, do not provide any cogent materials of evidence in which to anchor the said allegation and provide the foundation for the allegation in order to support the said application. As it stands, the learned counsel for RW appears to rely completely on the premise of this bare assertion in the said paras 5, 6 and 7 as being enough to satisfy O 15 r 6(1) of the RC 2012 and rr 11 and 16(1) of the DMPR 1980 and s 58(1) of the LRA. The case referred to by RW in *Ho Ching Choo lwn Ng Kian Beng* do not at all support her arguments. Umi Kalthum J said at para 3 as follows:

A ... Dakwaan Responden ini ada dinyatakan didalam Jawapan Responden ke Petisyen Perceraian ('Jawapan Responden'), di dalam perenggan 10. Maka permohonan Responden ini merupakan tindakan lanjutannya untuk membawa masuk pihak ketiga itu sebagai salah satu pihak dalam Petisyen Perceraian Pempetisyen isteri itu ...

B Clearly RW's, reliance on this authority in the present circumstances of this case is misplaced. In that case the required procedure had been adhered to by the respondent who had made a reply and included in the reply the issue of adultery which was then followed up with the application to name the C co-respondent in the petition which was noted by the said learned judge to be in line with the respondent's reply. However, such is not the case with RW in our present case. She had failed to file any reply to the said petition as required by the LRA and the DMPR 1980, but erroneously, proceeded to file an application to add a co-respondent and therefore failing to provide the D foundation for the present application.

[14] Apart from this I also found that:

(a) firstly, RW in her notice of application (encl 11) had anchored her E application apart from s 58 of the LRA, to r 17(3) of the DMPR 1980, in order to move the court. This rule has nothing to do with the nature of this application before the court. Rule 17(3) relates to filing of reply and subsequent pleadings:

F Rule 17 Filing of reply and subsequent pleadings

(1) ...

(2) ...

(3) No pleading subsequent to a reply shall be filed without leave.

G Secondly, in her submission, RW never referred to r 17(3) as in her notice of application but had anchored her arguments on r 15(3) of the DMPR 1980 which was never referred to in her notice of application in order to move the court. This again had nothing to do with the nature of this application by her:

H Rule 15 Supplemental petition and amendment of petition

(1) ...

(2) ...

I (3) Subject to paragraph (4), an application for leave under this Rule —

(a) may, if every opposite party consent in writing to the supplemental petition being filed or the petition being amended, be made ex-parte by lodging in the court office the supplemental petition or a copy of the petition as proposed to be amended; and

(b) shall, in any other case, be made on notice (or in the High Court by summons), to be served, unless otherwise directed, on every opposite party. A

(b) it is not refuted that the sealed copy of the said application (encl 11 had not been served on the solicitor for PH right up to the date that PH had affirmed his reply; B

(c) there is a complete failure to comply with the rules which would deny any mitigation in her case of non-compliance in order to salvage her application herein;

(d) no particularisation of the alleged act of adultery has been made in her affidavit to give PH the opportunity to make his reply and/or rebuttal for the court to appraise; C

(e) even though at this juncture, the matter is not yet tried for final determination, it has to be borne in mind at the outset that an allegation of adultery must be proved to the satisfaction of the court beyond reasonable doubt by oral testimony and to be tested by cross-examination and re-examination at trial. The degree of evidence must go beyond establishing suspicion and opportunity to commit adultery (see *Dr Gurmail Kaur a/p Sadhu Singh v Dr Teh Seong Peng & Anor*; *Karen Cheong Yuen Yee v Phua Cheng CHuen*). However, in the present case, in RW's application (encl 11) and her affidavit in support (encl 12), there is absolutely nothing in terms of facts or corroboration to even satisfy a reasonable and preliminary threshold of evidence to invite the court to inquire into the matter in order to allow the proposed joinder with the inclusion of the named party as a co-respondent. There was simply no existence of any degree of plausible evidence adduced except for a three-line bare averment; D E F

(f) there is a complete failure on the part of RW to comply with the instructions by the learned SAR during several of the CM sessions; G

(g) she had failed to file any pleading (reply to the petition) in response to the said single petition for divorce filed by PH:

(i) r 16(1) of the DMPR 1980, requires RW to file her answer to the said petition within 21 days after the time limited for giving notice of the intention to defend, and she has failed to provide any plausible excuse to the court to justify the non-compliance; H

(ii) in order to pursue an action against a co-respondent on allegation of adultery, RW would be required to cite the alleged adulteress in her said answer to dispute the petition (s 58(1) of the LRA) and it is only then, that it would be legally appropriate for her to make an application to add a co-respondent (r 11 of the DMPR 1980). However, she had failed to comply; I

(iii) when an answer (pleading) by RW (in the present case there is none), makes no reference of the alleged adulteress and the fact that RW can no longer tolerate living with PH (s 54(1)(a) of the LRA), that would amounts to her shutting herself out from seeking relief under sub-s (1)(a). She had fallen short of the requirement of the law in her pleadings (where there is none in the present case) (see *Shudesh Kumar a/l Moti Ram v Kamlesh a/p Mangal Sain Kapoor*); and

(iv) she has not taken any step in the proceedings with knowledge of the irregularity to remedy it although r 16(2) of the DMPR 1980 affords some latitude in the matter.

It is trite that in a trial by affidavits when one party makes factual allegations against the other (PH affidavit in reply in encl 13), and such allegations is left unanswered or unrebutted by RW, the failure to contradict it is usually treated as an admission of the facts so asserted (see *Ng Hee Thong & Anor v Public Bank Bhd* [2000] 2 MLJ 29). In the present case, RW elected not to answer to the averments in encl 13. In *Sykt Telekom Malaysia Bhd v Business Chinese Directory Sdn Bhd* [1994] 2 MLJ 420, it was ruled that where the court is expected to make a decision on affidavit evidence without oral evidence or cross-examination of the deponents of the affidavits, the court would be critical of the affidavit evidence which must on the face of it be plausible. If the allegations made by one party in the affidavit and those allegations were credibly denied by the other party, in the absence of oral evidence or cross examination, the judge must ignore the disputed allegations and decide the fate of the case by considerations of the undisputed facts.

[15] The averments by PH in his affidavit in reply (encl 13) in denying the allegation of adultery and stating other facts remained unrefuted by RW:

(a) she had left the matrimonial home around April 2017 and sometime in August 2017 she had removed all her personal belongings from the said home;

(b) on 10 April 2018, by her own solicitors' letter had agreed to proceed with a joint petition for divorce. On 23 April 2018, solicitor for PH had replied to the said letter and had forwarded a few terms for the said joint petition in which solicitor for RW by letter on 23 April 2018, suggested a review of those terms;

(c) on 16 May 2018, solicitor for PH issued a letter on the 'counter proposal' by RW. Her solicitor's letter dated 14 August 2018, confirmed her stand to proceed with a joint petition for divorce;

(d) on 27 May 2019, PH reiterated his terms as contained in his earlier letter dated 23 April 2018. In default of a reply by RW, he then instructed his

solicitor to proceed and file the single petition for divorce (encl 1) and duly informed the solicitor for RW on 11 September 2019;

(e) by 20 September 2019 all the relevant documents were served on the solicitor for RW;

(f) the first CM date was fixed on 27 September 2019 but solicitor for RW failed to attend but asked the solicitor for PH to mention on behalf. The second CM dated fixed on 23 October 2019;

(g) on 23 October 2019 CM, the solicitor for RW again failed to be present and again had asked the solicitor for PH to mention on their behalf. The third CM dated was fixed on 30 October 2019;

(h) RW till to date, failed to file her answer to the said divorce petition and therefore had failed to comply with the rules and practise in matrimonial proceedings;

(i) she failed to comply with the time instructions as directed by the learned senior assistant registrar ('SAR'); and

(j) RW had erroneously stated the date of the petition as 16 August 2019 in her affidavit in support (encl 12) when the correct date of the petition is 29 September 2019 (encl 1).

[16] Cognisance must be taken that:

(a) adultery is a legal issue which requires a high degree of proof to establish in a divorce proceeding and cannot be treated simply as a matter for simplistic bare assertion as in this present case. It carries with it damages (though not punitive or exemplary s 58(3)(b) of the LRA) for causing the breakdown of a lawful marriage under s 54(1)(a) of the LRA;

(b) the principal obligation in a divorce proceeding is the petition and answer to the said petition where other rights and obligations arises (guardianship, custody care and control, access, maintenance, division of matrimonial assets, adultery and damages for adultery) for the court's consideration; and

(c) I find that the action taken by RW to be contrary to the normal, established and regulated practise in matrimonial proceedings. By RW failing to answer (a principal obligation) the said petition for divorce, with no lawful excuse, she cannot simply proceed on an application on alleged adultery by PH when the rules and the law requires it to be stated in the said petition or answer to the said petition and only then an application for leave to add a co-respondent arises.

A CONCLUSION

[17] In light of the foregoing and after closely scrutinising the application, I dismissed RW's application with cost of RM1,000.

B *RW's application dismissed with costs of RM1,000.*

Reported by Ahmad Ismail Illman Mohd Razali

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